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No. 77-1424

In the Supreme Court of the United States

OCTOBER TERM, 1977

HARVEY BARRY JACOBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1978. A petition for rehearing was denied on March 29, 1978. The petition for a writ of certiorari was filed on April 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether government regulations excused petitioner's conduct in billing Medicaid and Medicare for laboratory tests which had not been performed in the manner represented.

2. Whether government regulations and practices of other laboratories were properly excluded from evidence.

3. Whether extrajudicial statements of a fugitive co-defendant were properly admitted into evidence.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of mail fraud in violation of 18 U.S.C. 1341.[1] He was sentenced to two years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App.).

1. The evidence showed a scheme by petitioner, a practicing physician, and fugitive co-defendants Victor H. Salerno and James K. Sawicki to defraud Medicare and Medicaid in two respects—by submitting claims for individual medical tests which in fact had been performed by means of a less expensive profile or battery testing procedure, and by submitting claims for tests which in fact had never been performed. The tests were performed (or were purported to have been performed) at the Metropolitan Diagnostic Laboratory, operated by Salerno, in which petitioner, who was at one time secretary of the laboratory corporation (Tr. 453), had an ownership interest (Tr. 99-100, 111, 121, 174-175, 246, 378).

[1]Petitioner was charged with ten counts of mail fraud, but the court required the government to select five for trial. The case was submitted to the jury with instructions that, if it decided that it could return a verdict of guilty with respect to any one or more of the five counts, it should return a single verdict without indicating which of the five mailings formed the basis thereof. This procedure—which had the effect of limiting petitioner's potential punishment to the maximum provided by a one count conviction—was suggested by the court during a prior trial which had resulted in jury disagreement and a mistrial (see Tr. 722-725 of the first trial) and was adopted on petitioner's motion over the objection of the government (see *id.* at 770-775).

Petitioner procured a loan to provide working capital for the laboratory (Tr. 98-100), endorsed and guaranteed the loan (Tr. 98), and recruited a pathologist for the laboratory (Tr. 174-175) and, thereafter, his replacement (Tr. 444-445). Petitioner also guaranteed the laboratory's lease on the profile testing machine (Tr. 60) and attempted to obtain money from Dr. DeMeo, an associate at his clinic, for leasing the machine (Tr. 115); he subsequently claimed to own an interest in the machine (Tr. 472). At a meeting at Dr. DeMeo's house, petitioner and Salerno explained that the machine would be used to "rip off" Medicare and Medicaid by making tests on it but billing those organizations for individual tests, a procedure which would yield a "1000 percent" profit (Tr. 78, 115-116, 379-380, 596). When Dr. DeMeo protested that such a procedure would be a fraud, petitioner's response was a "sardonic grin" (Tr. 380).

Petitioner and Salerno devised (Tr. 79-80) a laboratory order sheet to be used by petitioner's clinic (GX 37A). The order sheet had no place on it for ordering profile or battery tests, and it listed tests that the laboratory could not in fact perform. This order sheet was never shown to the pathologist whom petitioner had recruited for the laboratory. The pathologist was shown only the order sheet (GX 37B) used by other doctors availing themselves of the laboratory's services, which had a place for ordering profile tests and which listed only tests which the laboratory could perform (Tr. 180-183). Although petitioner testified that, for medical and malpractice reasons, he did not want battery tests performed for his patients (Tr. 500-501), in fact he knew that the laboratory was testing specimens that he sent it on the machine (Tr. 210). He was billed by the laboratory at the lower profile testing rate (Tr. 212-213, 289), and at first he was sent results on the teletype sheets which the machine printed.

Subsequently, the printed teletype results were transcribed onto individual reports for him; Salerno told the laboratory supervisor that this was done because petitioner did not want the printed teletype reports to appear on patient's charts in case there was an investigation (Tr. 311).

Petitioner was queried by the state Medicare agent as to whether tests for which claims were made were profile or individual tests (Tr. 158-159) and wrote in reply that he had ordered individual tests because he did not believe in mass profile screenings (Tr. 162-163). When personally interviewed by state health department and state Medicare investigators concerning claims he had filed, petitioner stated that his tests were ordered and made individually, and that he did not know if the laboratory even had a machine for making profile tests (Tr. 419-422). In the course of the interview, he tried to hide first his interest, and then the extent of his interest, in the laboratory (Tr. 420-421).

2. In many instances, specimens sent by petitioner were simply thrown away, and totally spurious test results were sent to him. This practice was indulged in only for petitioner's clinic patients and not for the patients of doctors not associated with his clinic (Tr. 285-287, 371-372). Salerno told a number of laboratory employees that petitioner was aware of the practice (Tr. 286-287, 313, 373). The woman who lived with Dr. DeMeo as his wife heard petitioner and Salerno discussing throwing away specimens (Tr. 112), and Salerno, in petitioner's presence, told her that they would bill for tests that would not be performed (Tr. 116). At one point, the laboratory pathologist told petitioner that he believed that tests were not being performed, and petitioner replied that he would talk to Salerno about it. Thereafter, petitioner called the

pathologist and stated that he was satisfied and happy with Salerno's work and trusted him (Tr. 184-185). There was other evidence that petitioner knew that he was getting results for tests which had not been performed: in many instances he had not sent in specimens even after being told that no specimens had been received; he was told that the laboratory did not have the tools to perform tests that he had ordered; he rarely sent enough blood for the performance of tests; he ordered more tests than could be performed on the amount of blood that could safely be drawn from a patient; and he ordered repetitive tests when results were normal without questioning their normalcy or otherwise caring what the results were (Tr. 247-251, 261-262, 285-286, 317-318, 331-332).

ARGUMENT

1. There is no merit to petitioner's contention that Department of Health, Education and Welfare regulations specifically permitted doctors to be paid for less expensive battery tests as if they were more expensive individual tests. The regulation which he cites (Pet. 13; see also J.A. V A22-A27) merely permits the doctor in billing to break down the total charge into individual components,[2] and the memorandum is concerned with the

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[2]The regulation in question (see Pet. 13) provides:

> Physicians or other persons who perform uniform series of tests and examinations or common combinations of procedures may, of course, itemize the individual components of these services on their bills if they wish and make separate charges for them. When this occurs a separate reasonable charge determination for each item is necessary.

The various memoranda which petitioner sought to offer into evidence (see J.A. V A23-A27) were concerned with the conformity to HEW regulations of the insurance carriers' policy of limiting payments to the battery or group rate in cases in which doctors ordered and received individual tests.

entirely different question of whether payments could be made on an individual basis for tests which were performed individually but *could have been* performed by the less expensive battery method. Indeed, the quoted memorandum endorses the principle "that it is not reasonable to allow reimbursement for a group of individual tests at perhaps $60 when the battery could be performed for around $10." There was, in short, ample evidence that petitioner "had devised a plan to defraud the Department by submitting fraudulently inflated billings of medical tests" (Pet. App. 2a).

2. Petitioner has no valid basis for complaining that he was precluded from offering the regulations and the practices of other laboratories to support a "good faith" defense (see Pet. 20-21). Petitioner's testimony and defense was that he had ordered, and so far as he knew received, individual test results (see Tr. 500-501); he nowhere testified that he had made claims on the basis of individual tests although ordering and receiving battery tests because he believed in good faith the regulations allowed him to do so.[3] The regulations and the practices of other laboratories were therefore immaterial. It would, of course, have been no defense that other laboratories also engaged in fraudulent practices. Cf. *United States* v. *Caldwell*, 544 F. 2d 691, 696 (C.A. 4).

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[3]Significantly, petitioner did not move the admission of the regulations in connection with his own testimony, and did not testify concerning his understanding of their provisions. He first sought to bring the regulations into the case during cross-examination of the state health department investigator (Tr. 430), and the court cut off questioning at that time, stating: "Let's get to it when we get to it" (Tr. 431). He then sought admission of the regulations through an official of the state Medicare agent (Tr. 556-560), after his own testimony was completed.

3. Salerno's hearsay statements that petitioner was aware that test results were being sent for specimens which were not actually tested were properly received in evidence. Even under the most stringent test, hearsay declarations of co-conspirators in furtherance of a conspiracy may be admitted if the independent evidence of the conspiracy is enough to take the question to the jury. Here there was clearly substantial independent evidence that petitioner and Salerno were engaged in a conspiracy to defraud Medicare. The testimony of Dr. DeMeo's "wife" and the pathologist, as well as petitioner's practices in regard to ordering tests (the insufficiency or lack of specimens, the number and repetitiveness of the tests ordered, and petitioner's unconcern with the results) and the fact that spurious test results were sent only in respect to petitioner's clinic patients, independently showed that the fraudulent conspiracy included making claims for tests that were never performed.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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